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REVIEW COMMITTEE

DECISION NO. 1984-04

August 9, 1984

IN THE MATTER OF the Railway Act and the
National Transportation Act;

and

IN THE MATTER OF the Transportation of
Dangerous Commodities by Rail;

and

IN THE MATTER OF the Report entitled "Railroad
Transport of Dangerous Goods in the Greater
Vancouver Region" dated May 1982 prepared by the
Regional Manager of the Railway Transport
Committee, Pacific Region;

and

IN THE MATTER of Orders No. R-35441 and
No. R-25437, both dated July 29, 1983;

and

IN THE MATTER OF Orders No. 121188 and
No. 121665 of the Board of Transport Commissioners
for Canada, dated June 22, 1966 and August 11, 1966,
respectively;

and

IN THE MATTER OF Order No. R-36314 dated
February 29, 1984;

and

IN THE MATTER OF an Application for review of
Order No. R-36314 dated February 29, 1984 filed by
Canadian Pacific Limited.

File No.: D.C. 30.3.1

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This application for review concerns the allocation of costs for safety related works adjacent to an overhead pipeline crossing in British Columbia. By Order Nos. 121188 and 121665 dated June 22, 1966, and August 11, 1966 respectively, the Board of Transport Commissioners for Canada authorized Trans Mountain Oil Pipe Line Company (now Trans Mountain Pipeline Company Limited and hereinafter referred to as "Trans Mountain"), to construct and maintain, at its own expense, a pipe rack across the right of way and track of Canadian Pacific Limited at mile 121 of the Cascade Subdivision in Burnaby, British Columbia in order to support an overhead propane gas pipeline. Apparently, there was increasing concern with respect to the possibility of a derailment in the vicinity of the pipeline crossing for on August 23, 1974, the Railway Transport Committee issued Order No. R-19236 which restricted the speed of all train movements in the vicinity of the Trans Mountain facility at mileage 120.94 of the Cascade Subdivision to 20 miles per hour. Further study was undertaken by officers of the Pacific Region of the Railway Transport Committee culminating in a report dated May 20, 1982. On July 29, 1983, the Railway Transport Committee issued Order No. R-35437 (amended by Order No. R-35483 dated August 4, 1982), which directed Canadian Pacific Limited to restrict the speed of all trains in the vicinity of the Trans Mountain facilities to 10 miles per hour. On February 14, 1984, the Railway Transport Committee convened a public hearing in Burnaby, B.C. before Mr. Commissioner David H. Chapman to resolve the safety related concerns respecting the operation of trains adjacent to the Trans Mountain facilities. Following this public hearing Commissioner Chapman prepared a report which was laid before the Railway Transport Committee at its meeting of Wednesday, February 29, 1984 (Commissioners Bourret, Chapman, Thompson, Trahan and Walter attending). The Railway Transport Committee adopted the report and thereupon issued Order No. R-36314 of February 29, 1984 which ordered Canadian Pacific Limited inter alia to install Jordan guard rail adjacent to the Trans Mountain's propane unloading facility at mile 121 of the Cascade Subdivision. This protection consists of two parallel rails inside the existing rails and is a form of protection often employed on railway bridges and tunnels in order to prevent a catastrophic derailment. Clause 4 of the said Order allocated the costs of installation fifty per cent to Trans Mountain and fifty per cent to Canadian Pacific Limited.

Following the issue of Order R-36314, Canadian Pacific Limited, by letter dated March 27, 1984, applied for review of the subject order. The written argument of Ms. M. Gail MacDonald, Solicitor for Canadian Pacific Limited advanced four allegations of error in respect of the cost apportionment issue. These alleged errors are summarized as follows:

- (1) It is an error of principle to hold that Trans Mountain should be relieved from any portion of cost liability simply because the prevention of derailments is outside of its control. Firstly, the cause of derailments is not limited to unsafe railway operations and secondly the guard rails

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are required because of the greater potential for a catastrophic derailment as a result of the location of the Trans Mountain facility at this site.

- (2) The guard rails are necessarily incidental to the pipeline crossing structure itself and therefore the costs associated with its installation should be allocated on the basis of the senior and junior rule. As a result Trans Mountain, as the junior party, should pay all of the installation costs.
- (3) CP has hitherto borne excessive costs and expenses in connection with train operations past the pipeline crossing in question, as a result of slow orders issued by the R.T.C. CP argues that Clause 4 of Order R-36314 imposes an unreasonable, inequitable and excessive porportion of financial responsibility for these safety precautions on CP.
- (4) Trans Mountain has at all times undertaken to be responsible for all costs and expenses associated with the installation of Jordan guard rail at this location.

Trans Mountain answered the Application for review through its corporate solicitor Mr. Michael W.P. Boyle. The position adopted by Trans Mountain in the review proceeding is that there was no reviewable error committed by the Railway Transport Committee in the adoption of Commissioner Chapman's report and that the disposition of the cost allocation issue was proper, since there was evidence to support the apportionment that was effected by Clause 4 of the impugned order. Canadian Pacific Limited replied to the Answer.

Findings and Conclusions

Canadian Pacific alleges that the guard rails are a work or structure which is necessarily incidental to the safe maintenance of the crossing structure. In our opinion the guard rails are necessarily incidental to the crossing structure, as they afford protection to the structure itself. Accordingly, the Railway Transport Committee erred in fact when it failed to find that the guard rails are a structure necessarily incidental to the overhead crossing. On this ground Order No. R-36314 is declared reviewable.

In the circumstances of this case we find as a fact that the Jordan guard rail is a structure that is necessarily incidental to the crossing structure itself. Ordinarily, the allocation of costs at a crossing is based on

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the senior and junior rule. This rule, of longstanding application in railway regulatory law, first determines the chronological order of creation of conflicting public or private rights of way, and apportions the costs of any crossing works against the junior party. Essentially, the party that is first in time is preferred in right. In this case Canadian Pacific Limited is senior in right at this crossing and Trans Mountain, as the junior party, has borne the cost of associated work at this crossing since the original order for leave to cross the railway right of way was granted by the Board of Transport Commissioners in 1966. In the result, Trans Mountain ought to be responsible for all of the costs associated with the installation of the guard rail which we have found to be necessarily incidental to the overhead crossing. Clearly, the Railway Transport Committee could come to no other conclusion in the particular circumstances of this case and accordingly, we see no need to refer the matter back to that Committee. The Application for review is granted and Clause 4 of Order R-36314 dated February 29, 1984, will be amended to apportion all of the costs of installing Jordan guard rail in accordance with that order on Trans Mountain.

The pleadings in this case have also disclosed one other important legal issue. There is evidence that Trans Mountain had at all times held itself out as ready and willing to accept liability for installation costs in respect of the Jordan guard rails. However, in the impugned order an entirely different cost apportionment was prescribed. It may well be that in the particular circumstances of this case there was an unusual exercise of discretion by the Committee, in that a tacit all party agreement may have been upset by the Order of the Committee. As such, there may have been a absence of adequate procedural protections, in the form of due notice, given to the parties with respect to the cost issue. However, the evidence before us was not sufficiently developed for this Committee to express an opinion in law on this subject.

An Order will issue amending Clause 4 of Order R-36314 of February 29, 1984 to apportion the installation costs in respect of the Jordan guard rail, in accordance with the senior and junior rule.

An Order will issue accordingly.

(signed)

J.G. Drainville,
Commissioner

(signed)

P. Langlois,
Commissioner



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